

## **§ 179.90**

## **40 CFR Ch. I (7–1–14 Edition)**

### **§ 179.90 Summary decisions.**

(a) After the hearing commences, a party may file a written motion, with or without supporting affidavits or brief, for a summary decision on any issue in the hearing. Any other party may, within 10 days after service of the motion, which time may be extended for an additional 10 days for good cause shown, serve opposing affidavits or brief or countermove for summary decision. The presiding officer may set the matter for argument and call for the submission of briefs if not submitted by the parties.

(b) The presiding officer will grant the motion if the objections, requests for hearing, other pleadings, affidavits, and other material filed in connection with the hearing, or matters officially noticed, show that there is no genuine disagreement as to any material fact bearing on the issue and that a party is entitled to summary decision.

(c) Affidavits should set forth facts that would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated. When a properly supported motion for summary decision is made, a party opposing the motion may not rest upon mere allegations or denials or general descriptions of positions and contentions; affidavits or other responses must demonstrate specifically that there is a genuine issue of material fact for the hearing.

(d) Should it appear from the affidavits of a party opposing the motion that for sound reasons stated, facts essential to justify the opposition cannot be presented by affidavit, the presiding officer may deny the motion for summary decision, order a continuance to permit affidavits or additional evidence to be obtained, or issue other just order.

(e) If a summary decision is not rendered upon all issues or for all the relief asked, and evidentiary facts need to be developed, the presiding officer will issue an order specifying the facts that appear without substantial controversy and directing further evidentiary proceedings. The facts so specified will be deemed established.

(f) A party may obtain interlocutory review by the Administrator of a summary decision of the presiding officer.

### **§ 179.91 Burden of going forward; burden of persuasion.**

(a) The party whose request for an evidentiary hearing was granted has the burden of going forward in the hearing with evidence as to the issues relevant to that request for a hearing.

(b) The party or parties who contend that a regulation satisfies the criteria of section 408 of the FFDCA has the burden of persuasion in the hearing on that issue, whether the proceeding concerns the establishment, modification, or revocation of a tolerance or exemption from the requirement for a tolerance.

[55 FR 50293, Dec. 5, 1990, as amended at 70 FR 33359, June 8, 2005]

### **§ 179.93 Testimony.**

(a) The presiding officer will conduct such proceedings as are necessary for the taking of oral direct testimony and for the conduct of oral examination of witnesses by the parties. The presiding officer shall limit oral examination to prevent irrelevant, immaterial or unduly repetitious examination.

(b) Direct testimony shall be submitted in writing, except that the presiding officer may order direct testimony to be presented orally in those unusual cases where the memory or demeanor of the witness is of importance. Written direct testimony shall be in the form of a verified statement of fact or opinion prepared by the witness, in narrative form or in question-and-answer form. Written direct testimony may incorporate exhibits. Such a verified statement or exhibit may not be admitted into evidence sooner than 14 days (or such other reasonable period as the presiding officer may order) after the witness has delivered to the presiding officer and each party a copy of the statement or exhibit. The admissibility of the evidence contained in such a statement is subject to the same rules as if such testimony had been given orally.

(c) Oral cross-examination of witnesses will be permitted. Each exhibit that a party intends to rely upon in cross-examining a witness shall be furnished to the other parties not later than 3 days (or such other reasonable period as the presiding officer may